MOTION FILED

JUL 21 2000

No. 99-1235

In the

Supreme Court of the United States

GREEN TREE FINANCIAL CORP. – ALABAMA, and GREEN TREE FINANCIAL CORPORATION,

Petitioners,

v.

LARKETTA RANDOLPH,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF TERRY JOHNSON AND THE ILLINOIS CONSUMER JUSTICE COUNCIL, INC. IN SUPPORT OF RESPONDENT

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Terry Johnson and the Illinois Consumer Justice Council, Inc., pursuant to U.S. Supreme Court Rule 37, bring this motion for leave to file an amicus curiae brief in support of Respondent Larketta Randolph, in *Green Tree Financial v. Randolph*, 99-1235 (USCA11). In support of this motion, Johnson states as follows:

1. Terry Johnson is the plaintiff in *Johnson v. Tele-Cash, Inc.*, 99-104-GMS, which was filed in the District Court of the District of Delaware and is currently pending in the Third Circuit Court of Appeals. Like the plaintiff in *Green Tree Financial Corp v. Randolph*, Johnson filed a class action complaint pursuant to the Truth In Lending Act, 15 U.S.C. §1601 *et seq.* ("TILA"). The claim is based on a short-term, high-interest (917% APR) loan obtained from the defendant creditors.

2. The defendants' standard form loan agreements contain an arbitration clause. The defendants moved to compel arbitration and the District Court denied the motion. *Johnson v. Tele-Cash, Inc.*, 82 F. Supp. 3d 264 (D. Del. 1999).

3. Although the outcome is the same as here (arbitration of a TILA claim was not compelled), the District Court based its decision on entirely different grounds than the Eleventh Circuit did in *Randolph v. Green Tree Financial Financial Corp.*, 178 F.3d 1149 (11th Cir. 1999). The District Court held that there was an "inherent conflict" between TILA's provision for class actions and arbitration.

4. This Court's ruling in *Green Tree Financial Corp. v. Randolph* will have a substantial impact on Johnson's case, in which an appeal is pending in the Third Circuit.

5. The Illinois Consumer Justice Council, Inc. ("ICJC") is interested in maintaining the continued effectiveness of federal, state and local consumer protection laws, including the Truth in Lending Act ("TILA"). To this end, it has engaged in advocacy efforts on behalf of consumers before federal and state legislatures and courts and administrative agencies. While respondent will argue in favor of that ruling, and ICJC supports respondent's position, ICJC's position is different. ICJC wishes to point out that Congress created a scheme of enforcing consumer credit statutes through statutory civil fines imposed in "private attorney general" class actions.

6. This will be the first Supreme Court ruling on arbitration clauses in the context of the Truth in Lending Act, indeed in the context of any consumer protection statute.

7. The parties have withheld consent to the filing of this brief.

WHEREFORE, Terry Johnson and the Illinois Consumer Justice Council, Inc. respectfully request that this Court grant them leave to submit their brief amicus curiae.

Respectfully submitted,

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INTEREST OF THE AMICUS CURIAE

A. Terry Johnson

Terry Johnson is the plaintiff in *Johnson v. Tele-Cash, Inc.*, 99-104-GMS, which is pending in the District Court of the District of Delaware.[1] Like the plaintiff in *Green Tree Financial Corp. v. Randolph*, Johnson filed a class action complaint pursuant to the Truth in Lending Act, 15 U.S.C. §1601 *et seq.* ("TILA"). Johnson's claims are based on a short-term, high-interest loan obtained from the defendant creditors.

The defendants' standard form loan agreements contained an arbitration clause. The defendants moved to compel arbitration and the District Court denied the motion. *Johnson v. Tele-Cash, Inc.*, 82 F. Supp. 2d 264 (D. Del. 1999). The District Court denied the motion on different grounds than those found in the Eleventh Circuit opinion that is being reviewed in this case. The defendants in *Johnson v. Tele-Cash, Inc.* have appealed the District Court ruling and that appeal is currently pending in the Third Circuit.

This Court's ruling on the matter could have a substantial impact on Johnson's case in that this will be the first Supreme Court ruling on arbitration clauses in the context of the Truth in Lending Act, indeed in the context of any consumer protection statute. Therefore, Terry

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[1] This brief was authored by counsel for Terry Johnson and the Illinois Consumer Justice Council, Inc. ("ICJC"). No one other than the ICJC or council for Johnson and ICJC made a monetary contribution to the preparation or submission of this brief.

Johnson respectfully requests this Court grant his motion to file this *amicus curiae* brief.

B. Illinois Consumer Justice Council, Inc.

The Illinois Consumer Justice Council, Inc. ("ICJC") is interested in maintaining the continued effectiveness of federal, state and local consumer protection laws, including the Truth in Lending Act ("TILA"). To this end, it has engaged in advocacy efforts on behalf of consumers before federal and state legislatures and courts and administrative agencies.

This appeal involves the issue of whether arbitration clause should insulate an entire industry from class action penalties prescribed by the TILA. The Eleventh Circuit has held that TILA claims cannot be arbitrated unless it is clear that the fee shifting provisions are of the statute are expressly left intact. While respondent will argue in favor of that ruling, and ICJC supports respondent's position, ICJC's position is different. ICJC wishes to point out that Congress created a scheme of enforcing consumer credit statutes through statutory civil fines imposed in "private attorney general" class actions. ICJC therefore asks this Court to hold that TILA claims are not arbitrable because of the inability to obtain the penalty through arbitration. The arbitration clause would effectively waive a penalty to which Congress intended to subject defendants in the public interest.

SUMMARY OF ARGUMENT

The Eleventh Circuit in *Randolph v. Green Tree Financial Corp.*, 178 F.3d 1149, 1158 (11th Cir. 1999) held that an arbitration clause in a credit transaction was unenforceable because the arbitration clause was silent as to whether a consumer bringing a suit pursuant to the Truth In Lending Act, 15 U.S.C. §1601 *et seq.* ("TILA") would be awarded fees and costs if she prevailed (because TILA is a fee shifting statute). Since arbitration in this case could not guarantee "that a consumer successfully arbitrating under this clause will not be saddled with a prohibitive costs order" it could not be said the consumer's ability to "vindicate her statutory rights will not be undone. . ." *Id.*

The plaintiff in *Johnson v. Tele-Cash, Inc.* also brought a cause of action pursuant to the TILA. Johnson brought his suit as a class action, as did the plaintiff in *Green Tree Financial.* The Eleventh Circuit did not consider whether the fact that the plaintiff had brought a class action suit pursuant to TILA, which specifically encourages and provides for class actions, also was a basis for not enforcing the arbitration clause because plaintiffs cannot bring class actions in arbitration.

The District Court in *Johnson v. Tele-Cash, Inc.* held that because Congress clearly intended that TILA be enforced through the use of a civil fine imposed in a "private attorney general" class action, the arbitration clause at issue was not enforceable. The District Court in *Johnson* followed Supreme Court precedent and determined that there was an "inherent conflict" between arbitration and the purpose of the Truth in Lending Act, 15 U.S.C. §1601 *et seq.* ("TILA") and the Electronic Funds

Transfer Act, 15 U.S.C. §1693 *et seq.* ("EFTA"). *See Shearson/American Express v. McMahon*, 482 U.S. 220, 227 (1987). The District Court analyzed the text of the statutes and legislative history and rightfully concluded that *Congress* was of the view that class actions were necessary to promote nationwide, uniform conformity with the TILA and to provide a meaningful enforcement provision for both statues. Enforcing arbitration would defeat Congress' express purpose of "encouraging" class actions. "[T]here would be no way to 'provide creditors with a meaningful incentive to comply with the law' since they would not longer be facing the 'meaningful penalty provisions [which were] needed to [e]nsure compliance.'" *See Johnson*, 82 F. Supp. at 269-70 (quoting S. Rep. 93-278, at 14-15). Thus, this provides an alternative basis for affirming the Eleventh Circuit decision in *Randolph v. Green Tree Financial Corp.*

ARGUMENT

I. INTRODUCTION

On July 10, 1998, Johnson applied for and received a short-term loan in the amount of $ 250 from the County Bank of Rehoboth Beach. The one-page loan agreement set forth an annual percentage rate of 917 percent and a finance charge of $88.[2] As a result, Johnson was required

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[2] The plaintiff in Johnson alleges that (1) the loan violated EFTA by imposing an irrevocable authorization for electronic payment; (2) the annual percentage rate and finance charge were not more conspicuous than any other terms in violation of

(continued...)

to repay his $250 loan by making one payment of $338 on July 24, 1998—two weeks after he submitted his loan application and received the $ 250.

The loan agreement provided the following "boiler plate" arbitration clause which, in relevant part, reads:

> **ARBITRATION**: You and we agree that *any* claim, dispute, or controversy between us . . . and any claim arising from or relating to this Note, no matter by whom or against whom . . ., *including* the validity of this Note and of this agreement to arbitrate disputes as well as claims alleging fraud or misrepresentation *shall* be resolved by binding arbitration . . . . This arbitration agreement is made pursuant to a transaction involving interstate commerce and shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16. Judgment upon the award may be entered by any party in any court having jurisdiction.
>
> (emphasis added).

Below this paragraph, the loan agreement provides two others which state: "Notice: You and we would have had a right or opportunity to litigate disputes through a court but have agreed instead to resolve disputes through binding arbitration." The document further provided, "By signing and sealing below, you agree to all of the terms of this Note including the agreement to arbitrate disputes."

Examples of arbitration clauses in other short-term, high-interest loans (oftentimes known as "payday" loans) are as follows:

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[2] (...continued)
TILA; (3) the loan was unconscionable, and (4) the arbitration clause should be declared void.

Check into Cash of Indiana, LLC, dba Check into Cash, 10075 E. Washington St., Indianapolis, IN 46229, (547.50% APR)

"ARBITRATION. Any controversy, claim or dispute arising out of or relating to this Agreement, or the breach thereof, whether sounding in tort, contract or otherwise shall be settled pursuant to the Indiana Arbitration Act, I.C. § 34-4-1-1, *et seq.*, upon the complaining party submitting tot he other party in writing an explanation of the claim and a demand that the claim be resolved by arbitration. If the other party does not respond to the submittal in writing within ten (10) days of its receipt, the claimant may pursue this claim through arbitration, court action or other means otherwise available. The arbitration shall be conducted by a single arbitrator selected by agreement between the parties hereto, or by petitioning the Indiana superior or circuit court to select the arbitrator if no agreement on the selection of an arbitrator can be reached by mutual agreement of the parties. Each party shall bear the costs of their own respective attorneys' fees in connection with any arbitration hereunder, and all costs and expenses other than attorneys' fees will be paid in accordance with the award issued by the arbitrator. Any and all damages awarded by the arbitrator shall be subject to confirmation by any court of the State of Indiana or any federal court located therein having proper jurisdiction."

Check 'n Go of Illinois, Inc., 2317 S. Cicero Ave., Chicago, IL 60804 (521.43% APR)

"*Arbitration Provision*. . . . There shall be no authority for any claims to be arbitrated on a class action basis. . ." *[Note: This is found in the middle of a two-paragraph, twenty-seven line arbitration clause.]*

National Money Service, Inc. 1156 W. 103d St., Ste 201, Kansas City, MO 64114 (APR allegedly not disclosed but estimated to be 780%)

"*Arbitration* You and we agree that any claim, dispute or controversy between us any claim either of us against the other (or the agents, servicers or assigns of the other including the company) and any claim arising from or relating to the agreement no matter by whom or against whom made including the validity of this agreement to arbitrate disputes as well as claims alleging fraud or misrepresentation shall be resolved by binding arbitration by and under the code of procedure of the National Arbitration Forum. . . ."

Hoosier Check Cashing of Ohio, Ltd., 2839 E. State Blvd., Ft. Wayne, IN 46805 (260.71% APR)

"ARBITRATION. To pursue any claim, demand dispute or cause of action ("claim") arising under this Agreement or any breach or default thereof, the claimant must submit to the other party in writing an explanation of the claim and a demand that the claim be resolved by arbitration. If the other party does not respond to the submittal in writing within ten (10) days of its receipt, the claimant may pursue the claim though (sic) arbitration, court action or any other means otherwise available. If the other party responds to the submittal in writing within ten (10) days of its receipt, the claim must be submitted to binding arbitration in accordance with the rules of the Uniform Arbitration Act approved by the National Conference of Commissioners on Uniform State Laws of the American Bar Association, as amended. The arbitration shall be conducted by a single independent arbitrator selected by Check$mart and conducted in the county where this Agreement was signed. The expenses of the arbitration, including attorney's fees, will be paid in accordance with the award issued by the arbitrator."

II. IF COMPELLING ARBITRATION DISRUPTS THE STATUTORY SCHEME, THE STATUTORY CLAIM SHOULD NOT BE ARBITRATED

The District Court in *Johnson* was correct in following *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) and *Shearson/American Express v. McMahon*, 482 U.S. 220, 227 (1987). When dealing with statutes that evince a contrary congressional mandate, "*deducible* from text or legislative history," arbitration is precluded on those claims. *Mitsubishi*, 473 U.S. at 628 (emphasis added). This intent is "deducible from . . . an inherent conflict between arbitration and the statute's underlying purposes." *McMahon*, 482 U.S. at 227.[3]

In *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court held that "So long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in an arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (quotations omitted).

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[3] This is consistent with the long-standing principle of statutory construction that the implications of one statute may be altered by the implications of a later statute. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 2000 U.S. LEXIS 2195, No. 98-1152, 2000 WL 289576, at *13 (Mar. 21, 2000); *Healthcare v. Watson Pharmaceuticals, Inc.*, 2000 U.S. App. LEXIS 6200, *20 n.3 (2d Cir. April 4, 2000); *Sunshine Health Systems v. Bowen*, 842 F.2d 1097, 1101 (9th Cir. 1988); *In re Johnson*, 787 F.2d 1179, 1182 (7th Cir. 1986). Of course, this is not the same as arguing that a prior statute was repealed by implication by a later statute.

Where the arbitration clause would be a barrier to a litigant's exercise of his or her statutory rights, the arbitration clause is unenforceable. *Randolph v. Green Tree Financial Corp.*, 178 F.3d 1149, 1157 (11th Cir. 1999) *cert. granted, Green Tree Financial Corp. v. Randolph*, ___ U.S. ___, 120 S. Ct. 1552 (2000); *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) ("When an arbitration clause has provisions that defeat the remedial purpose of [a] statute, . . . the arbitration clause is not enforceable").

"[A]rbitration of statutory claims works because potential litigants have an adequate forum in which to resolve their statutory claims and because the broader social purposes behind the statute are adhered to. This supposition[ ] falls apart, however, if the terms of an arbitration agreement actually prevent an individual from effectively vindicating his or her statutory rights. Accordingly, an arbitration agreement that prohibits use of the judicial forum as a means of resolving statutory claims must also provide for an effective and accessible alternative forum." *Shankle v. B-G Maintenance Management of Colorado, Inc.*, 163 F.3d 1230, 1234 (10th Cir. 1999).

Congress specifically provided for class action relief when enacting TILA, 15 U.S.C. §1640, and EFTA, 15 U.S.C. §1693m. Such relief is beyond the power of an arbitrator. *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995). If an arbitrator cannot grant the relief specified in TILA, the TILA claim cannot be subject to arbitration. *Baltimore & Ohio Chicago Terminal R. Co. v. Wisconsin Central Ltd.*, 154 F.3d 404 (7th Cir. 1998). Even where the claim is of a type which can normally be

arbitrated, if the arbitrators are deprived of the ability to afford complete relief, the particular arbitration clause cannot be enforced. *Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582 (D.S.C. 1998). An arbitration clause is unreasonable when it requires a consumer to give up access to the courts, forsake his rights and constitutional protections. *See In re Knepp*, 229 B.R. 821, 838 (Bankr. N.D.Ala. 1999).

In *Cole v. Burns Int'l Security Services*, 105 F.3d 1465, 1481-82 (D.C. Cir. 1997), the court emphasized that an arbitration clause cannot be used to deprive persons protected by the law of their substantive rights:

> **The starting point of our analysis is the Supreme Court's decision in *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20 (1991). In that case, the Court held that an employee's agreement to arbitrate employment-related disputes may require him to arbitrate statutory claims under the ADEA because "by agreeing to arbitrate a statutory claim, [an employee] does not forgo the substantive rights afforded by the statute; [he] only submits to their resolution in an arbitral, rather than a judicial, forum." *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628) (first alteration in original). As noted above, the Court emphasized that "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* at 28 (quoting *Mitsubishi*, 473 U.S. at 637) (alteration in original). . . .**
>
> **Obviously, *Gilmer* cannot be read as holding that an arbitration agreement is enforceable no matter what rights it waives or what burdens it**

imposes. See Gorman, 1995 U. ILL. L. REV. at 644 ("The Supreme Court in the Gilmer case did not hold that any sort of arbitration procedure before any manner of arbitrator would be satisfactory in the adjudication of public rights."). Such a holding would be fundamentally at odds with our understanding of the rights accorded to persons protected by public statutes like the ADEA and Title VII. The beneficiaries of public statutes are entitled to the rights and protections provided by the law. Clearly, it would be unlawful for an employer to condition employment on an employee's agreement to give up the right to be free from racial or gender discrimination. [citation] Any such condition of employment would violate Title VII, regardless of whether or not the agreement was viewed as a contract of adhesion. Thus, in a subsequent suit by the employee raising a viable claim of racial discrimination or sexual harassment, it would be no defense that the employee had signed a contract giving up her right to be free from discrimination.

Similarly, an employee cannot be required as a condition of employment to waive access to a neutral forum in which statutory employment discrimination claims may be heard. . . . At a minimum, statutory rights include both a substantive protection and access to a neutral forum in which to enforce those protections. See *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244, 1246-48 (9th Cir. 1994) (arbitration clause that purported to waive remedies provided by federal statute and to shorten statute of limitations for filing such claims violated statute and was unenforceable); JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 144-45 (1983) (preservation of "individual rights requires an accessible legal system for their protection" and enforcement)....

Cole further held that "[t]he premise of the [Supreme] Court's rulings . . . is that arbitration entails only a waiver of a procedural right to a judicial forum rather than a waiver of any substantive right accorded by the statute. *Id.*, at 1483, quoting S. Estreicher, Arbitration of Employment Disputes Without Unions, 66 CHI.-KENT L. REV. 753, 791 (1990).

The inconsistency between the substantive statute and arbitration need not be express. As the Seventh Circuit held in *Baltimore & Ohio Chicago Terminal R. Co. v. Wisconsin Central Ltd.*, *supra*, 154 F.3d at 410-11, "No provision of the Interstate Commerce Act expressly forbids the arbitration of claims under the Act. But the cases we have cited hold that the statutory prohibition need not be express to be effective; as in other cases of preemption, it is enough if allowing arbitration would disrupt the statutory scheme." *See also McMahon*, 482 U.S. at 227 (whether there is an "inherent conflict" is "deducible" between arbitration and the statute's underlying purposes).

Notwithstanding, creditors seek to insulate themselves from TILA's class action penalties and thereby thwart Congressional goals of promoting nationwide uniform compliance.

III. THE DISTRICT COURT PROPERLY CONCLUDED THAT THERE WAS AN "INHERENT CONFLICT" BETWEEN COMPELLING ARBITRATION AND THE UNDERLYING PURPOSES OF TILA AND EFTA

"[W]ithout the possibility of class action liability looming on a creditor's horizon, there is a very real possibility

that these entities will not voluntarily comply with the Truth-in-Lending regulations." *See Johnson*, 82 F. Supp. 2d at 271. The District Court correctly recognized Congress' concerns about lack of nationwide compliance and that the purpose of the class action remedy was to ensure such compliance. *See* S.Rep. 93-278 at 14-15 ("The Committee believes a maximum class action liability of $100,000[4] is sufficient to deter potential violations and achieve widespread compliance."). Without this remedy, the Court held the penalty of class relief imposed by Congress would be evaded and the consumer protection statutes would lose their sting.

A. The Purpose of TILA.

It is evident that Congress, in enacting the 1974 amendments to TILA, intended to create a private attorney general class action right for the express purpose of "insur[ing] nationwide adherence to uniform disclosures" and providing a vehicle by which courts can "assess a meaningful penalty upon a creditor to induce compliance with" TILA's requirements. S.Rep. 93-278, 14-15. The District Court correctly rejected the holdings of *Lopez v. Plaza Fin. Co.*, No. 95-C-7567, 1996 WL 210073 (N.D. Ill. Apr. 26, 1996) and *Sagal v. First USA Bank, N.A.*, 69 F. Supp. 2d 627 (D. Del. 1999). These courts failed to appreciate the intent of Congress. Their approach is inconsistent with the Supreme Court opinions that require this analysis. *See Lozada v. Dale Baker Oldsmobile, Inc.*, No. 99 CV 620, 2000 U.S. Dist. LEXIS 4122 (W.D. Mi. Mar.

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[4] Later this section was amended upward to $500,000.

27, 2000) (rejecting *Lopez* because decision in *Johnson* is a more "thorough discussion" of how remedial purposes of TILA are defeated by arbitration clauses).

The District Court reviewed the substantial amount of legislative history available that demonstrates Congress thoroughly evaluated its options for enforcement and purposefully incorporated class actions into its scheme for enforcement by "private attorney generals." In 1974, Congress amended §1640 to provide a cap on liability for class actions brought under TILA. *Watkins v. Simmons & Clark*, 618 F.2d 398, 400 (6th Cir. 1980); *Bantolina v. Aloha Motors, Inc.*, 419 F. Supp. 1116, 1119-20 & n.10 (D.Haw. 1976). This amendment was in direct response to courts' reluctance to certify classes under TILA. Prior to the amendment, a plaintiff was entitled to a minimum award of $100 under the statute. *See* 15 U.S.C. §1640 (1970). Without the cap, if a class action lawsuit involved millions of consumers, a defendant creditor would be liable for "an astronomical damage figure." For this reason, numerous courts found class actions *not* to be a superior method of adjudication because of the extreme penalty. The courts found this to be "inconsistent" with the "remedy Congress prescribed as the means of private enforcement." *See Ratner v. Chemical Bank of New York Trust Co.*, 54 F.R.D. 412, 414 (S.D.N.Y. 1972).

As stated by the District Court, "In response to these decisions, Congress amended the statute to provide a limit on the maximum recovery available under the TILA. This amendment was intended to encourage the federal courts to begin certifying class actions in Truth in Lending lawsuits." *See Johnson*, 82 F. Supp. 2d at 269; S.

Rep. 93-278, at 14-15 (1973); *Watkins*, 618 F.2d at 400 n.6; *Bantolina*, 419 F. Supp. 1116, 1119-20 & n. 11.

It was Congress's express intent to encourage the use of class actions as an enforcement mechanism. *See Watkins*, 618 F.2d at 401 & n.7 (citing S. Rep. 94-590, *reprinted in* 1976 U.S. Code Cong. & Admin. News, at 431, 438). While the amendment limited the exposure of creditors to the lessor of $500,000 or 1 per centum of their net worth, the amendment provided "a workable structure for private enforcement." *Id.* Congress concluded the cap to be a sufficient deterrent against a creditor of any size.

Congress decided that the statute would be enforced privately, and with class actions, *not* by a federal agency, such as the FTC. "The purpose of the civil penalties under [the] Truth in Lending [Act] was to provide creditors with a meaningful incentive to comply with the law without relying on an extensive new bureaucracy." S. Rep. 93-278, at 14.

The defendants in *Johnson v. Tele-Cash, Inc.* argue that *Gilmer* means that the inability to bring a class action does not make an arbitration clause unenforceable. But that argument takes *Gilmer* out of context. The court recognized that the EEOC, the administrative agency charged with enforcing the ADEA (the statute at issue in *Gilmer*), was still able to bring class actions. *Gilmer*, 500 U.S. at 32. Thus, the court relied in part on the fact that a federal agency had the power to enforce a statute with class actions; but, in this case, an agency is not effectively structured to do so, which Congress recognized and instead opted to encourage individuals to bring class actions. *See Watkins v. Simmons & Clark,*

Inc., 618 F.3d 398, 400 (6th Cir. 1980) (holding that the intended purpose of the TILA was to encourage class actions in the truth-in-lending context because of the apparent inadequacy of the Federal Trade Commission's enforcement resources) (citing S. Rep. 93-278, at 14-15).

It is important to note that Congress intended TILA remedies to be punitive in nature, rather than compensatory. Class actions under a statute such as the ADEA as discussed in *Gilmer* are really accumulating individual claims, whereas TILA class actions seek to impose statutory damages determined in the same manner as a criminal fine. Congress characterized the statutory damages provision as "the civil penalties section." S. Rep. 93-278, at 14.

Section 1640 provides that "In determining the amount of award [of statutory damages] in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional." The damages are thus assessed in the same manner as a *fine or punitive damages*, and the classwide statutory damages are not merely a convenient means of enforcing the individual rights of numerous class members. Because this penalty is similar to a fine, creditors should not be allowed to escape its effects by contract.

The purpose of the cap was to provide a meaningful incentive to effectuate compliance with the law and yet make the penalty reasonable. S. Rep. 93-278 at 14. Congress, concurring with the Federal Reserve Board, found

that "potential class action liability [wa]s an important encouragement to the voluntary compliance which [wa]s so necessary to ensure nation-wide adherence to uniform disclosure" since "[m]ost Truth in Lending violations do not involve actual damages and . . . some meaningful penalty provisions are therefore needed to [e]nsure compliance." *See Johnson*, 82 F. Supp. 2d at 270 (quoting S. Rep. 93-278, at 15). This is why it has been held that class-action exposure is "essential to the prophylactic intent" of TILA. *Bantolina*, 419 F. Supp. at 1120. This is what gives the statute its "sting." *Id.*

Thus there was ample evidence of Congressional intent for the District Court to conclude that "Congress did intend . . . to encourage class actions and to use the threat of class action recoveries to force compliance with the Act." *See Johnson*, 82 F. Supp. 2d at 270 (quoting *Watkins*, 618 F.2d at 402). The legislative history for TILA relied on by the District Court is more developed and expansive than a "general statement of legislative purpose." *See Pritzker v. Merril Lynch*, 7 F.3d 1110, 1119 (3d Cir. 1993). In *Pritzker*, the Court held that ERISA claims were arbitrable; it rejected statements that Congress intended the courts to provide a consistent source of law to help plan "administrators, fiduciaries and participants to predict the legality of proposed actions," because "general statements of legislative purpose" would not be sufficient to prohibit enforcement of arbitration agreements. *Id.* Nor would the Court draw an inference from a statute's jurisdictional provisions to mean that arbitration was precluded.

Here, Johnson is not relying on TILA's jurisdictional provisions. The legislative history here is far more

specific than what *Pritzker* rejected. The District Court did not rely merely on general statements of legislative purpose but Congress' recurrent modification of the statute for the express purpose of "encouraging class actions." The Senate Report reveals that Congress engaged in a thorough investigation and analysis in order to counter judicial hostility to TILA class actions and yet to still effectuate the goal of national uniform compliance. This is the same sort of legislative history that this Court relied on in *Sues v. John Nuveen & Co., Inc.*, where the Court held that Congress had expressed its intent to "encourage" arbitration in the context of the Civil Rights Act of 1991. *Sues v. John Nuveen & Co., Inc.*, 146 F.3d 175, 182 n.1 (3d Cir. 1998). Therefore, any argument that the legislative history is insubstantial must be rejected.

The District Court correctly concluded that by compelling arbitration, Johnson would be precluded from seeking class relief. This would strip the federal statute of its "sting" and reduce it to nothing more than its mere "nuisance" value. Consequently, creditors were not provided with a "meaningful incentive for compliance" since they would not be facing a "meaningful penalty provision." S. Rep. 93-278 at 14, 15. Congress determined this to be an effective and desirable means of vindicating the statute's cause of action and that class actions served a meaningful remedial and deterrent function. In light of this and the Supreme Court opinion in *Mitsubishi*, the District Court found an "inherent conflict" between compelling arbitration and the underlying purposes of TILA. *See Johnson*, 82 F. Supp. 2d at 271.

While the statute does not provide an *automatic* right to $500,000 worth of class relief (for obvious due process

concerns), it cannot be ignored that Congress intended for class relief to be part of its statutory scheme, and for this reason the District Court disagreed with *Lopez*. The District Court found that "by enforcing the boiler plate arbitration clause which is contained in this (an every other) one-page loan agreement unilaterally drafted by the defendants, the court would be allowing them to effectively insulate themselves against the very statutory penalties which Congress deemed necessary to 'provide creditors with a meaningful incentive to comply with the law.'" *See Johnson*, 82 F. Supp. 2d at 269 (quoting S. Rep. 93-278, at 14); *see also Powertel, Inc. v. Bexley*, 743 So.2d 570, 576 (Fla. App. Ct. 1999) ("The arbitration clause also effectively removes Powertel's exposure to any remedy that could be pursued on behalf of a class of consumers. . . Class litigation provides the most economically feasible remedy for the kind of claim asserted here. The potential claims are too small to litigate individually. . . The prospect of class litigation ordinarily has some deterrent effect on a manufacturer or service provider, but that is absent here. . .").

For example, Johnson could only recover a maximum of $1,000 statutory damages, *see* 15 U.S.C. §§ 1640(a)(1)(2)(A), whereas, as a representative of a class, he could obtain 500 times that amount. Enforcing the arbitration clause raises doubts as to whether TILA could serve both its "remedial and deterrent functions." *See Johnson*, 82 F. Supp. 2d at 270 (quoting S. Rep. 93-278, at 14).

Congress need not expressly discuss alternative dispute resolution options for a statute to preclude arbitration. But Congress need not discuss and reject all other options of enforcement. "[T]he cases we have cited hold that

the statutory prohibition need not be express to be effective; as in other cases of preemption, *it is enough if allowing arbitration would disrupt the statutory scheme.*" *Baltimore & Ohio Chicago Terminal*, 154 F.3d 404, 410 (7th Cir. 1998). TILA provides for class actions and judicial enforcement for exactly the same reasons that the Interstate Commerce Act at issue in *Baltimore & Ohio* confided certain tariff issues to the Surface Transportation Board—nationwide compliance and uniformity are essential. The statutory scheme here is to allow suit by "private attorney generals" and create liability of up to $500,000 or 1% of net worth for noncompliance.

In fact, because Congress has expressly "encouraged" arbitration of other statutory causes of action, principles of statutory interpretation would suggest that if Congress intended to encourage arbitration of statutory rights it could do so. *See Sues v. John Nuveen & Co., Inc.*, 146 F.3d 175, 182 (3d Cir. 1998) (discussing Section 118 of the Civil Rights Act of 1991). Section 118 provides: "Where appropriate and to the extent authorized by law, the use of alternative dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under [Title VII and the ADEA]." In relying on the same source of legislative history that the District Court did in this case, this Court found Congress sufficiently expressed its intent that claims under the ADEA may be arbitrated. This Court held:

> "Not surprisingly there is ample legislative history to support a straightforward reading of the text of §§ 118. The Report of the House Committee on the Judiciary, for example, explains §§ 118 as follows:
>
> 'This section "encourages" the voluntary use of conciliation, mediation, arbitration, and other methods

> of resolving disputes under Civil Rights laws governing employment discrimination.
>
> We agree that voluntary mediation and arbitration are far preferable to prolonged litigation for resolving employment discrimination claims. . .
>
> We recognize that mediation and arbitration, knowingly and voluntarily undertaken, are the preferred methods of settlement of employment discrimination disputes.
>
> H.R. Rep. No. 40(II), 102d Cong., 1st Sess. 78 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 764.'" *Sues*, 146 F.3d at 182 n.1.

To conclude that arbitration precludes Johnson's pursuit of his class action claim is to say he waived this remedy under TILA. This is precisely what Congress intended to prevent by providing that it is unlawful to discriminate against the exercise of any right under the Consumer Credit Protection Act. 15 U.S.C. §1691(a)(3).

In *Parker v. DeKalb Chrysler Plymouth*, *supra*, 673 F.2d 1178, 1182 (11th Cir. 1982), the court held that a general release did not apply to TILA claims. In so holding, it stressed that TILA is imbued with a public purpose with individuals and their attorneys serving as private attorneys-general. The specific grant of the right to bring class action litigation is part of enforcing that public purpose. If creditors were allowed to bypass the class action device through the use of arbitration clauses, congressional attempt would be stymied.

"Before *Gilmer*, courts had unanimously found that any waiver, including a knowing waiver, of statutory rights was precluded. In *Gilmer*, the Court established the baseline test that 'so long as the prospective litigant effec-

tively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent functions.'" *Hooters of America*, 39 F.Supp. 2d 582, 616 (D.S.C. 1998), quoting *Gilmer*, 500 U.S. at 28. Recognizing this concept, the Court of Appeals in *Tran v. Tran*, 54 F.3d 115 (2d Cir. 1995), held that statutory rights under the Fair Labor Standards Act could not be made the subject of binding arbitration. This decision affirms the validity of *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945), which the court relied upon in *Parker v. DeKalb Chrysler-Plymouth*, 673 F.2d 1178 (11th Cir. 1982), to hold that TILA rights were not the subject of a general release. Further, even the individual suit under Truth-in-Lending has public dimensions. *See Buford v. American Finance Co.*, 333 F. Supp. 1243, 1248 (N.D.Ga. 1971). Additional public-related benefits are provided by the stare decisis effect successful litigation may have entitling others to statutorily provided relief. . . " *Id.*; *Accord*, *Rodash v. AIB Mortgage Co.*, 16 F.3d 1142 (11th Cir. 1994) ("Congress intended the statute to create a system of private attorneys general to aid its enforcement; thus, to further its remedial purpose"). Reported decisions are important to the stated purpose of having standardized disclosures on a nationwide basis. No matter where you are in the country, you should get the same form disclosures. This requires reported decisions with reasons spelled out and subject to appellate review. The Court found reported decisions expendable under ERISA, *see Pritzker*, 7 F.3d at 1119, but under ERISA every plan can be different. The purpose of TILA requires uniform disclosures which necessitates reported law.

In *Broughton v. Cigna Healthplans of California*, 21 Cal. 4th 1066, 988 P.2d 67 (Cal. 1999), the court would not enforce an arbitration clause because it impeded the ability of plaintiff to "[play] in the role of a bona fide private attorney general" as intended by the California legislature in the California Legal Remedies Act (CRLA). *Broughton*, 988 P.2d at 76-77. Similarly, here, arbitration would impede the public benefit Congress intended by encouraging plaintiffs to bring class action suits as private attorney generals to enforce uniform compliance with TILA. The court in *Broughton* distinguished its holding from the outcome in *Mitsubishi Motors*, which held that the Sherman Act's treble damages provision only had an "incidental" public benefit. In *Broughton*, the intent to create "private attorney generals" and ability to obtain injunctive relief had a more tangible public benefit and was clear expression of legislative intent that suits brought under the CRLA were to have a public benefit rather than only compensate the plaintiff individually.

Similarly here, by encouraging plaintiffs to bring class actions for statutory damages, Congress intended for TILA to have a more tangible public benefit rather than merely compensate the individual. Given this legislative intent, it cannot be maintained that putting Johnson's claim in a forum that prevents the bringing of a class action does not defeat the legislature's intent. The conflict between the FAA and TILA need not be express but can be, and is, deducible from the text and legislative history.

B. TILA's Private Attorney Generals.

Certainly, class actions are part of TILA's statutory scheme of enforcement by "private attorney generals." Compelling a claim alleged as a class to be arbitrated as an individual claim is disruptive with that scheme.

TILA's statutory mandate of disclosure of material terms is intended to benefit all consumers and compliant creditors, not just the individual claimant. *Parker v. DeKalb Chrysler Plymouth*, 673 F.2d 1178, 1180 (11th Cir. 1982). The general statutory scheme envisions individual consumers acting as "private attorneys general." *Parker*, 673 F.2d at 1181. Congress intended to create a private attorney general class action right for the express purpose of "insur[ing] nationwide adherence to uniform disclosures" and providing a vehicle by which courts can "assess a meaningful penalty upon a creditor to induce compliance with" TILA's requirements. S. Rep. 93-278, 14-15. Enforcing arbitration here would defy congressional intent, and render TILA useless.

This congressional purpose has been recognized by every court to have considered the history of the act. An early case stating the purpose of TILA was *Ratner v. Chemical Bank*, 329 F. Supp. 270 (S.D.N.Y. 1971) where the Court held that "The scheme of the statute, *as both sides agree* (emphasis added), is to create a species of 'private attorney general' to participate prominently in enforcement . . . Congress made clear its broader scheme, and broader system of reimbursement, for private enforcement. It invited people like the present plaintiff, whether they were themselves deceived or not, to sue in the public interest. Following familiar precedents, it encouraged such actions by providing, in addition to the

incentive of public service, costs and a reasonable attorney's fee above the minimum recovery of $100." *Id.*

In *James v. Home Construction Co.*, 689 F.2d 1357 (11th Cir. 1982), the Court agreed with *Ratner*, and stated that "One of the congressional goals underlying TILA was the creation of a system of private attorneys general who could effectively enforce the Act without government intervention." *Sosa v. Fite*, 498 F.2d 114, 121 (5th Cir. 1974); *Bizier v. Globe Fin. Services, Inc.*, 654 F.2d 1, 2 (1st Cir. 1981); *Thomas v. Myers-Dickson Furniture Co.*, 479 F.2d 740, 748 (5th Cir. 1973).

In *Thomas v. Myers-Dickson Furniture Co.*, 479 F.2d 740 (5th Cir. 1973) the Court stated that "Section 1640 is intended to allow aggrieved consumers to participate in policing the Act. The domain of consumer credit with its allied commercial practices is no longer in the laissez faire era of caveat emptor. That doctrine is increasingly relegated to its proper place as a historical relic without modern application. The regulatory scheme forcefully expounds an emerging ethic of 'caveat vendor,' and we will not strain to avoid giving effect to the Federal Consumer Credit Protection Act." *Id.*; *see also Broughton v. Cigna Healthplans of California*, supra at 18.

IV. PROLIFERATION OF ARBITRATION CLAUSES IN CONSUMER LOANS INSULATES CREDITORS FROM CLASS ACTION PENALTY

The penalty in a class action—the lesser of 1% of a defendant's net worth or $500,000—is certainly a substantive statutory remedy. The class members need not sustain actual damages. Congress intended class action

awards to operate as a fine and enforce nationwide compliance with uniform disclosures. The only route to imposing this fine is via a class action. While class actions have their basis in civil procedure, Congress clearly incorporated the device into its statutory scheme as opposed to funding an administrative agency to enforce compliance. In, for example, a products liability suit, the use of a class action is procedural, no statutory damages are available on a class wide basis. Here, Congress put in place a fine to be assessed in a class action to enforce its requirement for uniform disclosure of credit terms on a nationwide basis.

The proliferation of arbitration clauses in consumer credit transaction would undermine this statutory scheme because a class action cannot be brought in arbitration. The clauses appear in all types of consumer credit transactions, from credit cards to high interest (e.g. 900%), short-term loans. *See* "First USA Wins Majority of Arbitrated Cases," *The Austin American-Statesman*, March 12, 2000, at J8; *Thompson v. Illinois Title Loans, Inc.*, 2000 U.S. Dist. LEXIS 232 (N.D. Ill. January 6, 2000); *Fastfunding the Company Inc. v. Betts*, 2000 Fla. App. LEXIS 3771 (Fla. App. Ct. March 31, 2000).

By including an arbitration clause in each of its standard form contracts with consumer borrowers, a short-term lender that fails to disclose a security interest properly would not have to worry about liability as to each of it customers. It is likely only a small percentage of customers would discover the violation and a small percentage of those customers would actually bring suit. Consequently, the creditor would only have to defend one

or two individual suits per year in arbitration and could absorb that expense as a cost of doing business—doing business in violation of TILA that is. Again, no governmental agency is going to swoop in and shut down the lender because Congress did not decide to fund an agency for that purpose. Congress did decide to use the class action device to enforce compliance.

CONCLUSION

WHEREFORE, Terry Johnson and the Illinois Consumer Justice Council, Inc. respectfully request that this Court affirm the Eleventh Circuit opinion for the reasons stated above.

Respectfully submitted,

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